Filed 5/15/07 P. v. Knight CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JESS PAUL KNIGHT, Defendant and Appellant.	D048230 (Super. Ct. No. SCN201467)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge. Affirmed as modified.

A jury convicted Jess Paul Knight of possession for sale of cocaine (Health & Saf. Code, § 11351), and simple possession of cocaine (Health & Saf. Code, § 11350, subd. (a)). Knight waived a jury trial and the court found true allegations that he suffered a prior conviction for possession of a controlled substance (Health & Saf. Code, § 11351; Pen. Code, § 1203.07, subd. (a)(11)) and allegations he suffered two prior convictions within the meaning of Penal Code section 1203, subdivision (e)(4). The court denied

probation and sentenced Knight to a seven-year prison term, consisting of two 3-year mid terms on the possession counts, and one year (one-third of two 3-year, concurrent mid-term sentences) for the prior convictions. On appeal, Knight contends the court abused its discretion by (1) admitting evidence of assertedly prior similar acts under Evidence Code section 1101, subdivision (b) and (2) permitting the prosecution expert witness to render an opinion on his guilt. He further contends his conviction for possession of cocaine under Health and Safety Code section 11350, subdivision (a) must be reversed because it is a lesser included offense of possession of cocaine for sale. The People concede the latter point and we agree it is appropriate to modify the judgment to reverse Knight's conviction for possession of cocaine. As so modified, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 2, 2005, Carlsbad Police Officer Eric Hoppe was on patrol in the area of a Motel 6 in Carlsbad and made a traffic stop of a vehicle occupied by Kristen Hernandez and Timothy Knight, respectively, driver and passenger. After the officer learned that both occupants had felony warrants and placed them under arrest, he searched their vehicle. Officer Hoppe found a rolled up dollar bill and a bindle made of white, lined paper containing a white powdery substance inside Hernandez's purse, and a lighter and tool on Timothy Knight's person. Timothy Knight admitted he used the tool as a cocaine pipe. Timothy Knight gave the officer permission to search hotel room 160 at the Motel 6, where he said he had stayed overnight with his brother, defendant Jess Knight. Carlsbad Police Officer Paul Reyes approached room 160 and contacted defendant, who had been in the room standing in front of a mirror wearing shorts. Upon

obtaining defendant's permission to search the room, Officer Reyes found four prescription bottles marked with defendant's name on the bathroom counter, as well as a red pouch containing 11 white, lined-paper bindles containing powdered cocaine. Officer Reyes also found a red box on the dresser containing a plastic scale with some white residue, a glass methamphetamine pipe under the bed, and a safe containing paperwork, $550 in cash and a ball of cocaine wrapped in plastic. Officer Reyes found the key to the safe and a clear plastic baggie containing more cocaine in defendant's right pants pocket. Defendant told the officer that the red pouch belonged to his brother Timothy Knight.

Carlsbad police sergeant Mickey Williams was called to the scene and observed the narcotics taken from defendant's hotel room. At trial, Sergeant Williams testified that on January 14, 2003, he was working as a narcotics detective when he contacted defendant and searched defendant's Encinitas residence, where he and other officers found approximately 133 grams of powder cocaine of which about 58 grams was prepackaged into 63 paper bindles. The bindles, located throughout defendant's bedroom, contained cocaine in amounts of approximately one-half gram (approximately 38 bindles) or one-sixteenth of an ounce (approximately 25 bindles), also known as a "teener." He also found a large ball of approximately 75 grams of powder cocaine in a safe. Sergeant Williams testified that the manner in which the cocaine was packaged in January 2003 was similar to the manner in which it was packaged in October 2005 in that they were all packaged in paper bindles in half-gram or one-sixteenth ounce quantities. He noticed that some of the bindles found in October 2005 were marked with a letter "T," which in his experience was a method of deciphering between a teener and a half-ounce

bindle. Sergeant Williams also found similarity in the fact that in January 2003, a "large ball quantity" of unpackaged cocaine – approximately 75 grams – and $17,000 in cash was found in a locked safe. Including other loose cash, a total of $22,072 was found in the residence in 2003. Approximately 6.5 grams of unpackaged cocaine was recovered from the safe in October 2005. In January 2003, defendant admitted to Sergeant Williams that the drugs, money and all of the bindles belonged to him. Sergeant Williams testified that based on his training and experience, as well as the history of his dealings with the defendant, defendant possessed the cocaine in October 2005 with the intent to sell it.

Defendant's brother, Timothy Knight, testified for the defense that he had stayed the night in the Motel 6 hotel room with his brother on October 1, 2005, and that the cocaine in the red case on the bathroom counter and in the safe belonged to him. He testified he had packaged the drugs in bindles and placed his initial on some of them. According to Timothy Knight, while defendant was sleeping, he had taken the safe key from defendant's pants pockets, placed the larger quantity of drugs in the safe, and returned the key to defendant's pants which were on the floor. Timothy Knight testified he was not selling the drugs; they were for his own personal use and they were packaged so that he could take them out one at a time. He denied that defendant used any of the cocaine with him.

DISCUSSION

I. *Admission of Prior Uncharged Crimes*

Knight[1] contends the court abused its discretion when it admitted Sergeant Williams' testimony about the quantities of cocaine and cash the detective found and the manner in which they were found in Knight's home in January 2003, for the purpose of showing identity, knowledge and intent under Evidence Code section 1101, subdivision (b) in the present case.[2] Specifically, on the issue of identity, Knight maintains the 2003 and 2005 incidents do not share common features that are sufficiently distinctive to support the inference that he committed the offenses in both cases. As for intent, Knight argues in part that the evidence was not probative because he removed the issue of intent for trial by presenting evidence that the contraband belonged to his brother. Knight also argues the evidence was not admissible on the issue of knowledge because he did not argue at trial that he was unfamiliar with cocaine. Finally he argues the evidence is not relevant to show common plan or design because the prior acts bear too many dissimilarities. We reject these contentions.

---

1 We refer to defendant hereafter as Knight.

2 In ruling the evidence admissible, the court confirmed that Knight's brother Timothy Knight was going to claim the drugs were his, and stated: "I think under [Evidence Code section] 1101 there are sufficient factors to show the similarity between the offenses to show the requirement for identity with the offer of proof of Timothy Knight and there is also sufficient – absent an admission by the defendant he knew what they were and what his intent was, those elements are also in question from the very outset. They will be admitted."

Under Evidence Code section 1101, subdivision (b), " '[E]vidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. [Citation.] Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent.' " (*People v. Carter* (2005) 36 Cal.4th 1114, 1147; *People v. Walker* (2006) 139 Cal.App.4th 782, 795-796.) A defendant's similar crime can be circumstantial evidence tending to prove identity, intent, and motive in the present crime, and "[l]ike other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence *vel non* of some other rule requiring exclusion." (*People v. Roldan* (2005) 35 Cal.4th 646, 705.) On appeal, we review the trial court's ruling on the issue, essentially a determination of relevance, for abuse of discretion. (*Carter*, at p. 1147.)

A. *Identity*

" 'To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses. [Citation.] Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a " 'pattern and characteristics . . . so unusual and distinctive as to be like a signature.' " [Citation.] "The strength of the inference in any case depends upon two factors: (1) the *degree of*

distinctiveness of individual shared marks, and (2) the *number* of minimally distinctive shared marks." ' " (*People v. Carter*, *supra*, 36 Cal.4th at p. 1148.)

Knight has not shown the court clearly abused its discretion in admitting his prior uncharged crimes on the issue of identity. Viewing the evidence in the light most favorable to the trial court's ruling (*People v. Carter*, *supra*, 36 Cal.4th at p. 1148), we agree the circumstances reveal a substantially distinctive pattern. In both instances, the sole drug found was cocaine; the cocaine was prepackaged in paper bindles in either one-half gram or one-sixteenth ounce quantities; the cocaine that was not prepackaged was found in ball form and placed in a safe along with relatively large amounts of cash; and the cocaine and cash were found where Knight was residing at the time. That the amount of cash and cocaine found with Knight in October 2005 was on a smaller scale than that found in 2003 does not defeat the latter incident's probative value on identity; "[t]o be highly distinctive, the charged and uncharged crimes need not be mirror images of each other." (*Ibid*.) These distinctions go to the weight of the evidence and did not preclude the prosecution from introducing evidence regarding Knight's 2003 offenses. (*Ibid*.)

Knight argues the facts are not sufficiently unique in view of Sergeant Williams' testimony that the bindles found in Knight's room were a common method of packaging cocaine for distribution. We are not persuaded. Even assuming the use of paper bindles is not unique or unusual among persons possessing cocaine for sale, there were still other sufficiently unique characteristics of both crimes to support the trial court's conclusion (use of a portable safe to store bulk cocaine in ball form, personal documents, and large

amounts of cash in Knight's residence). We cannot say under the circumstances the court's ruling was an abuse of discretion.

B. *Intent*

The same result follows on the issue of intent. In *People v. Roldan, supra,* 35 Cal.4th at p. 706, the court explained it has " ' "long recognized 'that if a person acts similarly in similar situations, he probably harbors the same intent in each instance' [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution." ' " Knight, however, argues that the prior acts were not relevant to intent because he had removed the issue by presenting evidence the contraband belonged to his brother, and the acts were too dissimilar in any event to show intent. We disagree.

Knight did not concede his intent as an issue in the case, and it remained an element of the possession for sale offense. When a defendant pleads not guilty, he or she places all issues in dispute, and thus the perpetrator's identity, intent and motive are all material facts. (*People v. Roldan*, *supra*, 35 Cal.4th at pp. 705-706, see also *People v. Balcom* (1994) 7 Cal.4th 414, 422-423; *People v. Catlin* (2001) 26 Cal.4th 81, 146.) In *People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4, the court pointed out a defendant's plea of not guilty puts all of the elements of the crime in issue for the purpose of deciding the admissibility of evidence of uncharged misconduct, unless the defendant as taken some action to narrow the prosecution's burden of proof. " '[T]he prosecution's burden to prove

every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.' " (*Id*., quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 69.) Here, there is no indication Knight removed the question of his intent as an issue by stipulating to any such intent (see *People v. Hall* (1980) 28 Cal.3d 143, 152, overruled on another point in *People v. Newman* (1999) 21 Cal.4th 413, 415, and superseded by Proposition 8, as noted in *Newman*, 21 Cal.4th at p. 419), nor does Knight point to anywhere in the record reflecting some sort of concession on the issue of intent. He argues intent was not in issue because he advanced a fact-based defense that his brother claimed ownership, but such a theory does not narrow the prosecution's burden; "it nevertheless was part of the prosecution's burden to prove such intent." (*Roldan*, 35 Cal.4th at p. 707.)

People v. Willoughby (1985) 164 Cal.App.3d 1054 (*Willoughby*), relied upon by Knight, is factually distinguishable. There, the defendant was charged with sexually molesting a young girl, and at trial, the court admitted evidence that defendant had also molested another young girl three years earlier, ruling that evidence relevant to intent. (*Id.* at pp. 1059, 1061, 1063.) On appeal, the court held the evidence improper and prejudicial on grounds the defendant's intent was not at issue because the sole evidence of his touching the victim was his admission that he spanked her, and thus there was no ambiguity in his intent. (*Id*. at pp. 1063-1064.) In reaching this conclusion, the court also pointed out the trial court had not admonished the jury not to consider the evidence as proof of his disposition (unlike this case, as we point out *post*, in part I(E)): "Because intent was not in issue and because the trial judge failed to admonish the jury not to

consider the evidence as proof of appellant's criminal disposition, the evidence could have been considered by the jury only to prove appellant's disposition to sexually molest children – the very purpose prohibited by Evidence Code section 1101, subdivision (a)." (*Willoughby*, *supra*, 164 Cal.App.3d at p. 1064.) We fail to see how the unique facts in *Willoughby* demonstrate that Knight narrowed the intent issue in this case by his proffered defense or show how he was prejudiced the court's ruling, even assuming it was error.

Knight's assertion that the incidents are too dissimilar for purposes of proving intent is meritless. "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) The prior 2003 incident's probative value was strong on the issue of Knight's intent given the similarities in packaging as well as the methods and location of storing the drugs and cash.

C. *Knowledge*

We further conclude the evidence of the 2003 incident was admissible to prove Knight's knowledge of the illegal nature of the cocaine possessed by him in October 2005, tending to prove he committed the offense of possession for sale. Without authority, Knight argues he never asserted he was unfamiliar with cocaine, thus rendering evidence of the 2003 incident irrelevant. We reject this reasoning – which presumably rests on a contention that Knight removed the issue of knowledge for the trier of fact – on the same grounds stated above as to admission of the evidence on the issue of intent.

D. *Common Design*

Given our conclusions above, we need not address Knight's contention that the prior act evidence was not relevant to show a common plan or scheme. The trial court did not admit the challenged prior act evidence on that issue.

E. *Evidence Code section 352*

Finally, we reject Knight's assertion that the probative value of the evidence was outweighed by its potential for prejudice and should have been excluded under Evidence Code section 352. We review a trial court's ruling under Evidence Code section 352 for abuse of discretion. (*People v. Valdez* (2004) 32 Cal.4th 73, 108; *People v. Cox* (2003) 30 Cal.4th 916, 955.) A trial court's ruling will not be reversed absent " 'a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

On this issue, Knight contends evidence of the 2003 incident was cumulative because the prosecution had already admitted abundant evidence on identity as well as dominion and control, namely, his presence in the hotel room at the counter where contraband was found, prescription bottles bearing his name, and government documents in the safe bearing his name, along with cash and cocaine. He maintains the result of its admission was merely to show he had a propensity to commit this type of drug crime, and it was highly prejudicial given the much higher quantities of bulk contraband and currency involved in the uncharged incident. Knight argues: "The revelation of appellant's connection to an earlier more serious incident did little if nothing to connect

him to the present incident. All it did was identify him as one who had engaged in more serious unlawful conduct in the past."

In assessing the trial court's ruling, the dispositive issue is whether the probative value of the 2003 incident was substantially outweighed by the potential for undue prejudice. " ' The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying Evidence Code section 352, "prejudicial" is not synonymous with "damaging." ' " (*People v. Karis* (1988) 46 Cal.3d 612, 638; see also *People v. Bolin* (1998) 18 Cal.4th 297, 320.) In our view, the 2003 incident had substantial probative value on the issues of identity, knowledge and intent, and therefore Knight has not demonstrated that the probative value of the evidence was substantially outweighed by the potential for undue prejudice. Additionally, Sergeant Williams' testimony on the prior incident did not take undue time, and it was no more inflammatory than the evidence related to the presently charged offenses.

As for Knight's assertion as to the evidence's cumulative nature, we disagree. Knight admitted in 2003 that the cocaine was his; the evidence as to dominion and control in that case was direct, whereas in the present case it was circumstantial. The evidence in the present case is not so compelling to render the prior uncharged act evidence cumulative. (See *People v. Lewis* (2001) 25 Cal.4th 610, 637; but see *People v. Balcom*, *supra*, 7 Cal.4th at p. 423 [evidence that defendant placed gun to victim's head before raping her constitutes compelling evidence on his intent, evidence of uncharged

similar offenses would be merely cumulative on that issue].) Nevertheless to the extent the evidence on identity was at all cumulative, its prejudicial effect, if any, was outweighed by its substantial probative value.

Importantly, the jury was specifically and unambiguously instructed that the prosecution bore the burden of proving the prior crime and it could consider the evidence only for the limited purpose of proving identity, intent and knowledge. The jury was also instructed not to conclude from the evidence that the defendant has a bad character or is disposed to commit crime. "We presume absent contrary indications that the jury was able to follow the court's instructions." (*People v. Pinholster* (1992) 1 Cal.4th 865, 919.) Nothing in the record suggests the jury did otherwise here, and this factor limited the prejudicial potential of the prior offense evidence for purposes of Evidence Code section 352. (See, e.g., *People v. Daniels* (1991) 52 Cal.3d 815, 858.) Knight has not shown the court exceeded the bounds of reason in admitting evidence of the 2003 offense at trial. (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

II. *The Court Did Not Err in Admitting Sergeant Williams' Expert Opinion*

Knight contends the court prejudicially erred by permitting Sergeant Williams to testify as to his opinion that Knight possessed the cocaine found in the motel room on October 2, 2005, with the intent to sell it. Relying on *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, *People v. Torres* (1995) 33 Cal.App.4th 37, and *People v. Brown* (1981) 116 Cal.App.3d 820, Knight maintains Sergeant Williams's testimony was tantamount to an improper legal conclusion on an ultimate issue on his guilt or innocence disguised as opinion testimony. The People respond that the issue was waived by

Knight's counsel's failure to object to the testimony, but that Sergeant Williams's expert opinion was a proper opinion on Knight's intent, not his guilt.

We agree Knight forfeited his evidentiary challenge by failing to object to Sergeant Williams' testimony. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171; Evid. Code, § 353 [judgment will not be reversed by reason of erroneous admission of evidence unless counsel makes a timely objection and states the specific ground for the objection, or moves to strike the objectionable testimony]; *People v. Valdez* (1997) 58 Cal.App.4th 494, 504-505.) "[A] defendant may not complain on appeal that evidence was inadmissible on a certain ground if he did not rely on that ground in a timely and specific fashion in the trial court." (*People v. Mickey* (1991) 54 Cal.3d 612, 689.) Because this authority requires the defendant advance a specific ground for any objection, we reject Knight's assertion that he preserved this challenge by his pretrial objection to prior uncharged misconduct evidence, an objection that Knight maintains encompassed any testimony that "might flow" from the prior uncharged misconduct. Nor do we agree that an objection would have been futile given the trial court's ruling on the Evidence Code 1101, subdivision (b) ruling; the court had no occasion to address Knight's claim as to an improper expert opinion, and we will not presume such a new objection would have been futile under the circumstances.

Even had a proper objection been made and we were to reach the merits, we would reject Knight's contention. We review the evidentiary challenge for abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 266.) As Knight concedes, expert opinion testimony that embraces an ultimate issue to be decided by the trier of fact may be

admissible at trial. (Evid. Code, § 805; *People v. Valdez*, *supra*, 58 Cal.App.4th at p. 507.) And expert testimony may be offered when it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." (Evid. Code, § 801, subd. (a).)

In cases involving possession for sale of a controlled substance, "experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as quantity, packaging and normal use of an individual; on the basis of such testimony convictions of possession for purpose of sale have been upheld." (*People v. Newman* (1971) 5 Cal.3d 48, 53, overruled on other grounds in *People v. Daniels* (1975) 14 Cal.3d 857, 862; see also *People v. Harris* (2000) 83 Cal.App.4th 371, 374-375; *People v. Parra* (1999) 70 Cal.App.4th 222, 227; *People v. Carter* (1997) 55 Cal.App.4th 1376, 1377-1378; *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1228-1229, citing *People v. Douglas* (1987) 193 Cal.App.3d 1691, 1694 [expert proper testified as to whether marijuana was possessed for personal use or for sale; interpretation of such evidence was sufficiently beyond common experience that the expert opinion would assist the trier of fact].) The question of whether drugs are possessed for the purpose of sale is a matter that is beyond the experience of the average juror and is an appropriate subject for expert testimony. (See *People v. Doss* (1992) 4 Cal.App.4th 1585, 1595-1596; *Harvey*, at p. 1228; *Douglas*, at p. 1694.) Knight does not raise any question as to Sergeant Williams' expert qualifications. We conclude the court did not abuse its discretion in permitting the challenged testimony.

We are not persuaded by Knight's reliance on *People v. Torres*, *supra*, 33 Cal.App.4th 37 or *People v. Brown*, *supra*, 116 Cal.App.3d 820. In *Torres*, a police officer testified to the legal meaning of the terms "robbery" and "extortion," and to his opinion that the crimes committed were robberies. *Torres* held the expert's testimony was improper because, under the facts of that case, "expressing the opinion the crimes were robberies was tantamount to expressing the opinion defendant was guilty of robbery and the first degree felony murder of [the victim]." (*Torres*, at p. 48.) *Torres* went on to distinguish cases where a jury would require the assistance of expert opinion as to the *element* of a crime. (*Id*. at p. 47.) Such is the case here, where the quantity and packaging of drugs for purposes of sale is sufficiently beyond the jury's experience. Nor do we agree with Knight that the officer's testimony in this case is more direct and damaging than in *People v. Brown*, in which the court held improper an expert officer's testimony that the defendant was working as a "runner" for a particular person. (*People v. Brown*, 116 Cal.App.3d at p. 829.) In *Brown*, that expert had already provided the jury with a definition of a runner, and under those circumstances the court of appeal held that under that definition and the trial court's instructions, the officer's opinion was tantamount to an opinion that Brown was guilty of the crime charged. (*Ibid*.) The *Brown* court reasoned: "The term 'runner' having been defined for them, the jur[ors] were as qualified as the witness to determine whether Brown was 'working as a runner for Lucille Carson.' " (*Ibid*.) Here, the jury did not have any such definition, and as we have stated, the question at hand was not within their common knowledge. *Brown* does not change our conclusion.

III. *Conviction of Possession of a Controlled Substance*

Knight contends that the offense of possession of cocaine in count two was a necessarily lesser included offense of the offense in count one, possession of cocaine for sale, and as a consequence the conviction for simple possession must be reversed. The People acknowledge that Knight's charges and conviction were based on the same contraband and concede that under the statutory elements test for determining lesser included offenses (*People v. Reed* (2006) 38 Cal.4th 1224, 1229-1231), the offense of possession of cocaine is indeed a lesser included offense of possession of cocaine for sale. We agree the count 2 conviction should be reversed or vacated as necessarily included in the count 1 offense of possession for sale. (*People v. Oldham* (2000) 81 Cal.App.4th 1, 16, citing *People v. Pearson* (1986) 42 Cal.3d 351, 355 & *People v. Magana* (1990) 218 Cal.App.3d 951, 954.)

DISPOSITION

The judgment is modified to strike the conviction on count 2 for possession of a controlled substance. As so modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment in accordance with this opinion and forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.